

The Parties' Submissions

Mr Da Silva's Submissions

[3] Mr Da Silva seeks an award of costs of \$8,000 plus disbursements of \$71.55 being the Authority filing fee. There is a further claim of \$230 (incl GST) for printing, binding and stationary expenses. Mr Da Silva submits that these amounts are appropriate in the totality of the circumstances including the parties' conduct, the preparation required (including further submissions and information required after the investigation meeting), the complexity of the matter and DSJ's general lack of engagement throughout the proceedings.

[4] Mr Da Silva further submits that the conduct of the respondent and their representative has unnecessarily prolonged matters but does not provide any supporting facts for this submission. Mr Da Silva also submits that DSJ were provided with good faith offers to settle prior to the investigation meeting and says that the Authority's award comfortably exceeded the settlement offers made. In his submissions Mr Da Silva only provided one without prejudice letter dated 17 November 2023 offering full and final settlement of \$13,450, which included a contribution to costs and GST. Excluding costs, the Authority's total award to Mr Da Silva was \$14,760.32.

DSJ's Submissions

[5] DSJ submits that costs should lie where they fall. In support of this submission, DSJ's submits that Mr Da Silva was not successful because the Authority found that Mr Da Silva had only been constructively dismissed and actually only succeeded in a breach of s130 of the Act in respect of incomplete wage and time records and therefore that Mr Da Silva had only "mixed success" and referred to the cases of *Health Waikato Ltd v Elmsley*² and *Zhang v Telco Asset Management Ltd*³ in support of a reduction in costs.

[6] DSJ further submits that the claim of constructive dismissal had not been advanced by Mr Da Silva until closing submissions and that DSJ had been put to the cost of defending allegations of actual dismissal and unjustified disadvantage, neither of which were found.

² [2004] NZCA 35

³ [2020] NZEmpC 9

Relevant Principles

[7] The power of the Authority to award costs is contained in s 15 of schedule 2 of the Act. The usual principle for costs is that a successful party is entitled to a contribution towards their costs of representation for the Authority process.

[8] The principles and the approach adopted by the Authority in which an award of costs is made are well settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*⁴ as confirmed in *Fagotti v Acme and Co Limited*⁵. The principle set out in these cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful parties' conduct, although conduct which increased costs unnecessarily can be taken into account in inflating or reducing an award of costs.

[9] Since it was submitted it is also necessary for me to comment on DSJ's submission of Mr Da Silva's mixed success and whether any adjustment to the daily tariff amount is reasonable on this basis.

Analysis

[10] As already noted, the Authority has adopted a daily tariff approach to considering costs. The current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days⁶. The parties can expect the Authority to adhere to this approach, unless there are good reasons to depart from it. The daily tariff is accordingly the starting point for the Authority's determination of costs but can be adjusted for relevant factors.

[11] The investigation meeting for this matter was set down for and took most of a full sitting day and was held in person. The applicant attended together with his representative and his wife as a witness, and Ms Leaf appeared for the respondent, together with two witnesses.

[12] Mr Da Silva was generally successful in his claim that he had been unjustifiably dismissed by the actions of DSJ and was awarded compensation, reimbursement of lost

⁴ *PBO Limited v Da Cruz* [2005] 1 ERNZ 808

⁵ [2015] NZEmpC 135 at 114.

⁶ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

wages and a penalty payable to Mr Da Silva for DSJ's failure to provide compliant wage and time records and it is appropriate that he receive an award of costs.

[13] The question of mixed success and an applicant's entitlement to costs has been resolved by the Employment Court⁷. The position is that any success for an applicant is sufficient success for the purposes of costs, and this is the situation in the present case.

[14] Mr Da Silva was fundamentally successful in his claim that he was unjustifiably dismissed by the actions of DSJ, albeit constructively. DSJ had an opportunity to submit on the constructive dismissal aspect in closing submissions in reply to Mr Da Silva's closing submissions. In conclusion, costs should therefore follow the event, and Mr Da Silva is entitled to an award of costs.

[15] However I am not persuaded that this case requires a departure from the Authority's daily tariff approach or any adjustment thereof. Mr Da Silva did not provide any supporting grounds for the submission in respect of DSJ's conduct and neither did the Calderbank referred to "comfortably beat" the award made. There was also no unusual complexity in the case that taken together gives me any cause to increase or reduce the daily tariff for a one-day investigation meeting. Orders are made accordingly.

[16] As the successful party, Mr Da Silva is also entitled to be reimbursed the Authority's filing fee (\$71.55). Orders are made accordingly.

Orders

[17] DSJ Joinery Limited is ordered to pay to Deivid Mariotti Da Silva within 28 days of the date of this determination:

- (a) the sum of \$4,500 as a contribution to costs; and
- (b) the sum of \$71.55 as reimbursement of the filing fee.

Alyn Higgins
Member of the Employment Relations Authority

⁷ *William Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156.